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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, TO THE USE OF LEWIS E. SMOOT.

No. 381.

BRIEF FOR DEFENDANT IN ERROR.

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Statement of the Case.

One Peyton D. Vinson secured a contract for the construction of sewers for the District of Columbia and gave bond with the Fidelity and Deposit Co., of Maryland, as surety, to secure not only the faithful performance of the contract, but also to secure the payment by the contractor of all bills for labor and materials furnished him in the prosecution of said public work. The bond is that required by the Act of Congress of February 28, 1899,

which authorizes any material man to sue the surety in the name of the United States to his use whenever the contractor fails to pay for materials furnished him and used by him in the construction of public works.

The plaintiff below who had furnished the contractor with sand and gravel of the value of $536, procured a copy of the bond and contract under the requirements of the statute and filed his suit. The action being one arising *ex contractu*, plaintiff's declaration was supported by an affidavit of merits, under the Seventy-third Rule of the Supreme Court of the District of Columbia.

The defendant below having failed to deny in his affidavit of defense the right of the plaintiff to recover, and having failed also to state in his affidavit any grounds of defense, judgment was given for plaintiff. From this judgment appeal was taken to the Court of Appeals of the District of Columbia, where the judgment was affirmed.

On Assignments of Error.

THE FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR, that the judgment under the Seventy-third Rule was in violation of the Fifth and Seventh Amendments of the Constitution, and of Sec. 861, Rev. Stats., U. S., prescribing mode of proof in trial of actions at common law, can be considered together.

It can be truthfully said that no court in the United States, either Federal or State, has ever held any rule of court or statute similar in purpose or language to the Seventy-third Rule of the Supreme Court of the District of Columbia, to be unconstitutional, or to violate any statute of the United States, or to violate the constitution of any State of the United States. Counsel for plaintiff in error, in his able and ingenious brief, raises no new

question, nor any question that has not been decided against him in every court where raised.

The requirment of an affidavit of merits in certain actions is an old common law rule of practice, treated in Chitty's General Practice, Vol. 3, p. 543, and in Tidd's Practice, Vol. 1, p. 302.

In New York, Michigan, and the District of Columbia the practice is governed by a rule of court; in Pennsylvania, Massachusetts, Illinois, Mississippi, Colorado, Maryland, Virginia, and some other States by statute. In New York the rule dates back to 1808 (3 Johns. 535), and in Pennsylvania to the Act of March 28, 1835, and in Massachusetts and Illinois the rule is old, and in these States the constitutionality and legality of the rule have been attacked in every possible way and the rule has been everywhere sustained.

Vannata v. Anderson, 3 Binn. (Pa.), 423.
Hoffman v. Locke, 10 Pa. St., 57.
Lord v. Ocean Bank, 20 Pa. St., 387.
Lawrence v. Bohm, 86 Pa. St., 225.
Randall v. Weld, 86 Pa. St., 357.
Lawrence v. Smedley, 6 W. N. C. (Pa.), 42.
Honeywell v. Toney, 5 Kulp. (Pa.), 360.
Krause v. Penn. R. R., 20 W. N. C. (Pa.), 111.
Hunt v. Lucas, 90 Mass., 404.
Merchant's Bank v. Glendon Co., 120 Mass., 97.
McDonnell v. Olwell, 17 Ill.
Roberts v. Thompson, 28 Ill., 70.
Honore v. Home Nat. Bank, 80 Ill., 489.

In the District of Columbia the constitutionality and legality of the Seventy-third Rule is no longer an open question.

Cropley v. Vogeler, 2 Appeals D. C., p. 28.
Foertsch v. Germuller, 2 Appeals D. C., p. 340.

The Supreme Court of the United States in the case of Smoot v. Rittenhouse, decided Jan. 10, 1876, upheld the constitutionality and legality of the Seventy-third Rule. Though no opinion was delivered further than "the judgment is affirmed," an examination of the record and briefs of counsel will show that the court in affirming the judgment necessarily sustained the legality and constitutionality of the Seventy-third, then the Seventy-fifth, Rule, the assignments of error in that case being: 1st, that the court had no power nor authority of law to establish the rule, and, 2d, that the rule is in derogation of the right of trial by jury.

The Court of Appeals of the District of Columbia, speaking of the Seventy-third Rule, in Cropley v. Vogeler, 2 Appeals D. C., 28, said:

"We have yet to hear that in any State of the Union which has adopted such a code of procedure as we have mentioned, it has ever been held that such procedure was in antagonism to its constitutional guarantees. We find no such antagonism between this rule and our Federal Constitution. * * * A suit at common law might well result in an issue of law through the instrumentality of a demurrer, and assuredly it will not be claimed that in such cases there is any right of trial by jury."

It is perfectly plain that the affidavit of defense is nothing more than a special plea under oath, and that the motion of the plaintiff for judgment under the Seventy-third Rule is merely a demurrer to a plea, and raises an issue of law for determination of the court. If the affidavit of defense does not raise a material question of fact, there is nothing for a jury to try.

The Court of Common Pleas of Philadelphia framed a rule which provided that in all actions on contract or debt the plaintiff should be at liberty to enter judgment, unless the defendant should file with his plea a sufficient

affidavit of defense. This rule was attacked as infringing the right of trial by jury, and as being judicial legislation beyond the power of the court to make, but the appellate court said:

"The rule makes no alteration in the right of trial by jury, but only provides that previous to the trial the defendant shall swear or affirm that to the best of his knowledge and belief he has a just cause of defense."

Vannata v. Anderson, 3 Binn. (Pa.), 422.

Also:

Harres v. Commonwealth, 35 Pa. St., 416.

Speaking of the constitutionality of an act of the legislature which required the defendant in certain actions to file an affidavit of defense, the court, in Hoffman v. Locke, 19 Pa. St., p. 59, said:

"The clause of the constitution which forbids it is not pointed out, and I am ignorant of any provision which secures to the good people of this commonwealth the privilege of making false defenses to just claims. The law is not only constitutional, but eminently wise and necessary. It is no tyranny to require that a good defense should be fully and fairly stated on the record, and no hardship to verify it under oath."

Again the court said in Lawrence v. Borm, 86 Pa. St., 225:

"Clearly if a defendant in an action presents no defense to be tried by a jury, he can not claim that his privilege is denied him. The affidavit of defense is but a special plea made on oath, by which the defendant presents the facts of his case for the consideration of the court. At no time in the history of civil proceedings has it been held that the right of trial by jury involves the right of the jury to decide the law of the case. A plea in abate-

ment, and in other cases, * * * must be put in under oath. There can not be any objection to the fact that a party is obliged to state his plea or defense under oath. This is but a means to prevent delay by falsehood and fraud. * * * It is a misconception of the right of trial by jury to suppose that it draws the pleadings, no matter what their form, from the court to the jury.

"The affidavit of defense is only a modern but valuable mode of making up the issue for the jury, and when on a statement of all the facts a defendant can swear to conscientiously, the court finds the law upon these facts is against him, he has no right to go before a jury."

In Massachusetts a statute similar to the Seventy-third Rule was attacked as unconstitutional in Hunt v. Lucas, 99 Mass., 404, the court said:

"In some cases the common law required a defendant not only to state his defense but to make oath to it. In actions of debt and several other species of action, the plaintiff might require him to wage his law and this must be done upon oath. In suits in equity a defendant has always been required to make oath to the truth of his answer. * * * These provisions were more stringent than that of our statute requiring an affidavit of defense. But when our constitution was framed they had never been regarded as any infringement on those rights which are declared in the clauses referred to, nor is there any reason to believe that the constitution was designed to prohibit the legislature from enacting reasonable laws in regard to pleadings in civil actions or from requiring averments to be supported by affidavit."

So in Illinois in the case of Honore v. Home Nat. Bank, 80 Ills., 489, the constitutionality of a statute similar to the Seventy-third Rule was upheld as being merely a provision of practice, in no way denying the right of trial by jury or any other constitutional right.

The objection that the Seventy-third Rule is judicial

legislation beyond the power of the court to make is fully discussed in the case of Vannata v. Anderson, 3 Binn. (Pa.), 422, and in Cropley v. Vogeler, 2 Appeals D. C., where the power to prescribe rules of practice is held to be inherent in every court of general jurisdiction, and the requirement of an affidavit of defense is a wise and proper rule of practice to facilitate the administration of justice, to save needless expense and delay, and to prevent the abuse of the processes of the court. The power of the Supreme Court of the District of Columbia to make the Seventy-fifth, now the Seventy-third Rule of Practice, was upheld by the Supreme Court of the United States in affirming the judgment of the court below in the case of Smoot v. Rittenhouse, hereinbefore cited.

Counsel for plaintiff in error comes to the Supreme Court of the United States in the novel and unique predicament of not citing or quoting, and not being able to cite or quote even one case of any court, State or Federal, which has ever held that the statutes and rules of court of the various States, which require affidavits of defense, are in violation of the Fifth or Seventh Amendments of the Constitution, or contrary to the mode of proof prescribed by law as set out in the first, second and third assignments of error.

Furthermore, it is impossible to imagine how the United States Supreme Court could have sustained the lower court in the case of Smoot v. Rittenhouse, decided Jan. 10, 1876, without having decided adversely to the plaintiff in error in this case every point which he raises in his first three assingments of error.

The Seventy-third Rule of the Supreme Court of the District of Columbia is not only not a novel application of the affidavit of defense system, but is much less drastic than the rules and statutes of similar purpose elsewhere. Rule 28 of the Supreme Court of New York requires an

affidavit of defense to prevent judgment in all common law actions.

3 Waits Practice, N. Y.

The statute of Massachusetts requires an affidavit of defense in all common law actions.

Hunt v. Lucas, 99 Mass., 404.

Section 697 of the Mississippi Code of 1892 applies to all common law actions.

Section 37, p. 1047, of the Rev. Stats. of Illinois, requires an affidavit of defense where plaintiff files an affidavit of merits, in all suits upon contract, express or implied, for the payment of money.

Chapter 186 of the Laws of Maryland, 1886, provides for affidavits of merits and defense in every suit where the cause of action is a contract, either express or implied.

The Pennsylvania Act of May 25, 1887, requires an affidavit of defense in all actions of assumpsit.

Even at common law, in certain cases, affidavits of defense were required to be drawn with great technical skill and accuracy to prevent judgment for the plaintiff.

Chitty's General Prac., 543.
Tidd's Prac., Vol. 1, 302.

Fourth Assignment.

(a) Counsel for plaintiff in error argues, first, under this assignment, that the Seventy-third Rule is inconsistent with the laws of the United States, and points to certain sections of the District Code that he claims bear out his contention. Even a cursory reading of those sections

will show that they in nowise conflict with the Seventy-third Rule of practice.

Instead of changing the mode of proof in trials at common law, or the common law principles governing the burden of proof, or the constitutional form of trial, as argued by counsel, the rule merely requires that the defendant shall present in the pleadings some issue of fact for a jury to decide, and verify his defense under oath. The rule requires no more than that the defendant shall file a special plea under oath, where the plaintiff makes an affidavit of merits.

Cropley v. Vogeler, 2 Appeals D. C.
Lawrence v. Borm, 86 Pa. St., 225.
Hunt v. Lucas, 99 Mass., 404.
Honore v. Home Bank, 80 Ill., 489.

(b) Plaintiff in error further contends under this assignment that actions against sureties on bonds are not within the purview of the Seventy-third Rule. The rule itself expressly prescribes that it may be used "*in any action arising ex contractu.*" Counsel for appellant does not contend that this action is not one "arising *ex contractu*," but, he argues, there are implied exceptions to the rule, and one implied exception is actions against sureties on building contractors' bonds.

In no State where rules and statutes similar to our Seventy-third Rule are in force is there to be found a decision holding that actions upon bonds against sureties are excepted.

In Pennsylvania, where actions have been brought under statutes similar to our Seventy-third Rule, since March 28, 1835, and where the courts have found many implied exceptions to the statute, it has never been held that suits on bonds against sureties merited an exception. Nor in New York, where the rule dates back to 1808;

nor in Massachusetts, Mississippi, Maryland, Michigan, Illinois or elsewhere. Where exceptions have been made, either by the court or by the legislature, in the rule or the statute, or implied exceptions to the rule have been established by the courts, it has never been thought necessary or reasonable to except suits on bonds against sureties from the operation of the rule or statute.

In Illinois, where the same question was raised, when certain suits were brought against sureties on appeal bonds, the court held that—

"Where an action is brought on an appeal bond it is an action on contract for the payment of money, and if the plaintiff files the affidavit required by the statute, defendant must file an affidavit of merits, to prevent judgment by default."

Coursen v. Browning, 86 Ill., 57.
Myers v. Shoneman, 90 Ill., 80.

It will be observed that in the case at bar the defendant (appellant) does not even attempt to comply with the terms of the Seventy-third Rule. His affidavit of defense treats the rule as a nullity. He sets up no defense whatever in his affidavit; not even the semblance of a defense. He practically says he has no defense. He says he has not sufficient information to deny the plaintiff's declaration or affidavit under oath. It is hard to see what benefit a trial by jury would be to the defendant. If he can not deny the justice of the plaintiff's demand in the affidavit, he would be no better off if he got before a jury. If the affidavit he has made can avail him in this case, then any defendant, in any case, can make a similar affidavit, and the Seventy-third Rule will become absolutely useless for any purpose.

If the defendant (plaintiff in error) has no personal

knowledge of the contracts upon which the suit is brought, it is the defendant's own neglect and laches. He does not hold out in his plea or affidavit the expectation or hope that he ever will have any personal or other knowledge of the contracts.

The defendant, as the record shows, became surety on the bond of one Vinson, who had the contract for the construction of certain sewers in the District of Columbia. The very bond which the defendant signed as surety recited and notified him that he would have to pay all the bills for material used in the sewers that the contractor failed to pay. The plainest dictates of prudence would urge the surety to keep informed as to the liabilities of the contractor, and at least to know whether he was paying for the material he was using. In the case of a sewer contractor whose materials for construction are simply sand, cement, and brick, it becomes peculiarly easy for a surety to keep informed as to the liability of his principal. If he does not keep so informed the surety is guilty of the grossest neglect and he can not come into court and plead his own neglect as an excuse to avoid judgment under the Seventy-third Rule. By indifference or neglect or omission on his own part, the surety remains in ignorance of what his principal on the bond is doing, and then, when sued, the surety sets up his self-imposed ignorance as a reason why the Seventy-third Rule should not apply to him, and attempts to use that ignorance to vex and delay the plaintiff without setting up a single fact or setting out a single ground of defense. If such an affidavit as that filed by the defendant will satisfy the requirements of the Seventy-third Rule under the circumstances, then, if the principal were sued instead of the surety, the principal could with as much reason frame a sufficient affidavit of defense in the following form: "My foreman made the contract for the sand required on my sewer work. I have

no personal knowledge of how much sand he bought or who furnished it. I neither admit nor deny the statements made in the declaration and affidavit of the plaintiff and demand strict proof."

A surety who can neither admit nor deny the facts sworn to in the affidavit of the plaintiff who would be just as impotent in the presence of a jury as in the presence of the Seventy-third Rule. It would only be necessary for the plaintiff to take the stand and repeat what he said in his affidavit in order to procure the verdict of the jury, for the defendant admits that he can not truthfully deny the plaintiff's statements. A trial by jury would, under the circumstances, be the merest pantomime.

Counsel for defendant (plaintiff in error) argues that there is a new principle, of importance to corporations engaged in the bonding business, involved in the application of the Seventy-third Rule to this case. Yet the counsel does not cite a case, either in the District courts, or in the courts in any State or Territory, where affidavits of merits and defense are used, where it has been held that there is any implied exceptions under the rule in favor of sureties. The patent sophistry of the defendant's argument lies in the assumption that the surety is in a position where it can not ascertain the contracts of the principal. If that were true, it would be sufficient to answer, "Why, then, did you go into such a dangerous undertaking?" But the fact is apparent that the surety can, by a few minutes inquiry, ascertain from the contractor or his workmen where the material used is being bought, and as easily, or by a mere ring at the phone, ascertain of the material man the quantity of material furnished and whether it is paid for.

Material men, who look for safety to the surety, are always glad to advise the surety of the amount of their claims. Even the most ignorant contractor knows that his surety can put a judgment against him for every cent

paid out by the surety to material men, and, therefore, the surety is not without the support and backing of the contractor, whose self-interest dictates the fighting of every dishonest claim. No surety who takes the most commonplace steps that prudence can dictate, will ever have to pay a dishonest claim because of the Seventy-third Rule, while a surety company, that acknowledges that it is groping in blind ignorance of the transactions of its principal, holds out a standing invitation to fraudulent claimants.

The case of Richards Co. v. Rothwell, 18 Appeals D. C., 536, quotes the case of U. S. v. Nat. Surety Co., 92 Fed. Rep., 549, as defining the relation of the surety to a material man on a contractor's bond such as used in this case.

"The bond which is provided by the act was intended to perform a double function; in the first place, to secure the Government for the faithful performance of all obligations which the contractor might assume towards it, and in the second place, to protect third persons from whom the contractor obtains material and labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties, that they shall be paid for whatever labor and materials they may supply, and enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, one for the benefit of the Government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments. The act bears every evidence that it was intended to provide a security for laborers and material men on which they could rely confidently for protection."

The case of Dean v. Echols, 2 Appeals D. C., cited by counsel for appellant, in no way supports the appellant's argument. That was a suit growing out of a breach of contract and for unliquidated damages. The case at bar

is an action *ex contractu* for a liquidated and specific sum of money—a money demand, pure and simple, for the payment of which there is an express contract. The case of Bailey v. D. C., 4 Appeals D. C., is equally foreign to the issues presented here.

Sufficiency of Plaintiff's Affidavit.

(c) The only argument presented under this assignment is that copies of the bonds and contracts should have been filed with the declaration and affidavit. An examination of the pleadings will show that, both in the declaration and affidavit, the conditions of the contracts and bonds are fully set forth, and that profert of the contracts and bonds is made in both the declaration and affidavit. The contracts and bonds being matters of public record, it was not even necessary for the plaintiff to make profert of them.

U. S. v. Ritchie, 3 Mackey, 132.

The allegation of profert only need be made in the declaration and the deed is then, constructively, in possession of the court.

Bouvier's Law Dict., 769.
11 Md., 322.
67 Fed. Rep., 597.

Insufficiency of Defendant's Affidavit.

(d) As before stated, the defendant has not set up in his affidavit a single ground of defense, nor has he even attempted to do so. A plainer case for judgment under the Seventy-third Rule could not possibly be presented to the court. The case of Bailey v. D. C., 4 Appeals D. C., cited by defendant's counsel, in no way supports his

contentions. In that case, Bailey had sued the District upon an award and had made an affidavit of merits. The District Commissioners filed with their plea a lengthy affidavit of defense, denying the averments of plaintiff's affidavit, but plaintiff claimed judgment on the ground that the defendant had not sufficiently stated the grounds of defense. This court simply held the affidavit of defense sufficient, upon the ground that a municipality which acts through its agents, who are changeable, would not be required to state the grounds of its defense with that particularity required of other defendants.

It is submitted that the action being one arising *ex contractu* upon a money demand for a liquidated sum, based upon an agreement of the obligors to pay for the material furnished by the use plaintiff, and no grounds of defense having been interposed to plaintiff's affidavit, as required by the Seventy-third Rule, the entry of judgment under the rule was proper.

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